

1979

# The Minnesota Supreme Court Prehearing Conference--An Empirical Evaluation

Minn. L. Rev. Editorial Board

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Editorial Board, Minn. L. Rev., "The Minnesota Supreme Court Prehearing Conference--An Empirical Evaluation" (1979). *Minnesota Law Review*. 3126.

<https://scholarship.law.umn.edu/mlr/3126>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## Note: The Minnesota Supreme Court Prehearing Conference—An Empirical Evaluation

### I. INTRODUCTION

The workload of appellate courts has grown dramatically in recent years. Filings in the federal courts of appeals increased nearly 300% from 1961 to 1974.<sup>1</sup> State supreme courts have also begun to feel the burden of a substantial increase in their caseloads.<sup>2</sup> Filings in the Minnesota Supreme Court, for example, rose from a total of 584 in 1971 to 921 in 1975,<sup>3</sup> an increase of 58% in only four years.

This trend has resulted in long delays before appeals can be heard and finally decided. Minnesota, one of the few states with a population over two million having only one appellate court, has experienced considerable delay problems.<sup>4</sup> In 1976, the average case processing time for opinions issued by the Minnesota Supreme Court was 14.25 months.<sup>5</sup> By comparison, the American Bar Association standard for timely disposition of complex appellate cases is approximately seven months.<sup>6</sup>

---

1. P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 4 (1976) [hereinafter cited as *JUSTICE ON APPEAL*].

2. In Virginia and Nebraska, for example, supreme court filings have increased more than 200% between 1962 and 1971. D. MEADOR, *APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME*, at 8 (1974).

3. L. JENSEN & J. REHAK, *MINNESOTA SUPREME COURT AUTOMATED CASEFLOW, MANAGEMENT AND DOCKETING FEASIBILITY REPORT 95* (excerpt on file at the *Minnesota Law Review*).

4. See Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 *STAN. L. REV.* 121, 131 (1977).

5. L. JENSEN & J. REHAK, *supra* note 3, at 20.

6. The ABA standards for appellate decisionmaking are as follows:

(1) Record. The record should be completed within 30 days after it is ordered. A shorter time should be provided in appeals that normally do not require transcripts, for example appeals from interlocutory orders.

(2) Briefs. Appellant's brief should be filed within 30 days after the record is filed in civil cases and 20 days in criminal cases. The briefs of appellee or respondent and other parties should be filed within 30 days after appellant's brief is filed in civil cases and 20 days in criminal cases. Reply briefs should be optional and required to be filed within 10 days after respondent's brief has been filed.

(3) Argument and Submission. Oral argument, or the decision conference in cases not orally argued, should be held promptly after the briefs are closed. Responsibility for the court's opinion or memorandum should be assigned at the decision conference and preparation of the opinion or memorandum commenced as soon as possible.

(4) Decision. For a court sitting in panels of three judges, the average time for rendering decision should not exceed 30 days; the maximum time for any

A less apparent but more serious result of appellate overcrowding is the adverse effect it has on the judicial decisionmaking process and the quality of appellate decisions themselves. The traditional appellate decisionmaking process consisted of an initial evaluation of a case by an individual judge followed by a final decision reached through collaborative efforts of the full court.<sup>7</sup> With the volume of cases increasing, however, judges often do not have the time to study fully all the briefs and records,<sup>8</sup> nor have they sufficient opportunity to express their own views, or reflect on those of their colleagues, in opinion conferences and dissenting opinions.<sup>9</sup> These time constraints, of course, may affect the outcome of cases. For example, a recent study indicated that appellate courts processing fewer cases are more likely to reverse than are more crowded courts.<sup>10</sup>

Courts and legislatures have made various attempts to cope with the rising tide of appellate litigation. Some jurisdictions have responded by adding new judges<sup>11</sup> or increasing the number of law clerks and other support personnel.<sup>12</sup> Another approach taken by sev-

---

case, except for one of extraordinary complexity, should not exceed 60 days. For a court sitting in larger panels, the average time should not exceed 60 days; the maximum time, except in cases of extraordinary complexity, should not exceed 90 days.

AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO APPELLATE COURTS § 3.52 (1977). Thus, assuming *arguendo* that all appellate cases warrant maximum consideration time, have reply briefs filed, are heard before a full panel of judges, and are granted a 30 day hearing delay, the average total processing time would be 220 days, or approximately 7.3 months.

7. See JUSTICE ON APPEAL, *supra* note 1, at 9. This traditional process is sometimes said to embody the twin imperatives of "judicial individuality" and "judicial collegiality." See *id.* See generally K. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS (1960); R. POUND, THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE (1906).

8. See Address by Justice James Otis of the Minnesota Supreme Court to the Appellate Practice Institute, Minneapolis, Minnesota, at 2 (Nov. 4, 1977) (transcript on file at the *Minnesota Law Review*) [hereinafter cited as Otis Address].

9. *Id.*

10. See Kagan, Cartwright, Friedman & Wheeler, *supra* note 4, at 131. These authors found that reversals increased in the North Carolina Supreme Court after the creation of an intermediate appellate court that allowed the supreme court greater discretion in selecting cases. But see Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1203 (1978) (reporting empirical findings that do not support the hypothesis that more crowded courts have lower reversal rates).

11. The Minnesota Supreme Court, for example, added two more justices to the existing seven-member panel in 1973. Act of May 24, 1973, ch. 726, § 1, 1973 Minn. Laws 2134 (codified at MINN. STAT. § 480.01 (1978)). The response of adding new justices has obvious limitations. Beyond a certain number, the law of diminishing returns may begin to operate. See *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 54 (1954) (Frankfurter, J., concurring) (citing H.R. REP. NO. 1506, 82d Cong., 2d Sess. (1952)).

12. Law clerks typically assist an individual judge with his research and other

eral states that previously had two-tiered court systems, has been to create an intermediate appellate court, allowing the highest state court to hear cases only upon grant of certiorari.<sup>13</sup> Attempts have also been made to abbreviate decisionmaking procedures in certain cases. Some courts use a screening process to segregate cases for different procedural treatment according to their importance and complexity.<sup>14</sup> The increased use of summary and per curiam opinions is another means by which appellate decisionmaking time has been reduced.<sup>15</sup>

In 1976, the Minnesota Supreme Court adopted a different approach to the problem of appellate overcrowding. Instead of increasing its number of decisionmakers, or further abbreviating its appellate procedure, the court introduced mandatory prehearing confer-

---

routine tasks. See Ragatz & Shea, *Supreme Court Law Clerks*, 35 WIS. B. BULL. 33 (1962). A recent variation on the individual clerk practice has been the utilization of central staffs. Under this method of organization, the staff performs the traditional functions as well as other tasks such as screening cases for different procedural treatment, monitoring the processing of appeals, and placing cases on calendars for argument. The central staff clerks are not assigned to individual judges, but rather work as a team under the direction of a central staff director. See generally D. MEADOR, *supra* note 2, at 231-39. For examples of the makeup and function of central staffs in the Michigan Courts of Appeals, the California Court of Appeals for the First Appellate District, and the United States Courts of Appeal, see *id.* at 198-216, 231-39.

13. See, e.g., CAL. CONST. art. 4, § 4; OHIO CONST. art. IV, § 6; ILL. ANN. STAT. ch. 37, § 25 (Smith-Hurd 1979); PA. STAT. ANN. tit. 17, § 111 (Purdon 1962). Some states provide for direct appeal to the highest appellate court only in certain specified cases and allow other appeals to be heard only upon grant of certiorari, writ of error, or some similar jurisdictional grant. See, e.g., ILL. ANN. STAT. ch. 37, § 32.2 (Smith-Hurd 1979) (appeal by right to highest appellate court for questions raised under the United States or state constitution for the first time as a result of appellate court action, or certification by a panel of the appellate court for decision by the supreme court or leave of the supreme court); PA. STAT. ANN. tit. 17, § 181 (Purdon 1962) (superior court jurisdiction by writ of certiorari or error; original jurisdiction in supreme court by writ of mandamus or prohibition).

14. In Minnesota, for example, a commissioner appointed by the supreme court reviews the records and briefs for each appeal, except for special matters. L. JENSEN & J. REHACK, *supra* note 3, at 9. Based on his review, the commissioner determines whether a case should be briefed and argued orally, or whether it should be decided solely on the basis of submitted briefs. See MINN. R. CIV. APP. P. 134.07(2). If a case is assigned for oral argument, the commissioner, based upon the "legal and judicial significance of the issues raised," advises whether it should be argued before the court en banc or before a three-judge panel. MINN. R. CIV. APP. P. 135(2). If a case is scheduled for decision without oral argument, the commissioner prepares a memorandum to aid the court in its decision. D. MEADOR, *supra* note 2, at 227. For a description of this process in the Michigan Court of Appeals, see *id.* at 201.

15. Summary opinions state the disposition of a matter without further explanation. See, e.g., MINN. R. CIV. APP. P. 136.01. A per curiam or memorandum opinion provides explanation of the reason for a decision, but usually not the court's entire reasoning process. See generally JUSTICE ON APPEAL, *supra* note 1, at 33-41.

ences in order to decrease the number of cases that reached the appellate level for decision. The prehearing conference is not a novel idea. Since 1938 federal trial courts have employed pretrial conferences under rule 16 of the Federal Rules of Civil Procedure. The use of this type of conference dates back even further in state trial courts.<sup>16</sup> Appellate courts, however, have not adopted such conferences until quite recently. In 1974, the Second Circuit Court of Appeals became the first federal appellate court to experiment with prehearing conferences.<sup>17</sup>

The overriding purpose of the prehearing conferences is to reduce litigation by encouraging parties to settle their disputes prior to an appellate hearing. This Note examines how well the prehearing conference has served that purpose in its first year of use in Minnesota. The Note first describes the conference procedures and discusses the controversy that has surrounded the use of prehearing conferences at the appellate level. Next, it describes the empirical tools used by the authors to study the impact of these conferences on the 1976-1977 Minnesota Supreme Court. Finally, this Note analyzes the results of that empirical study and makes several suggestions for the future use of prehearing conferences in Minnesota.

## II. THE PREHEARING CONFERENCE IN MINNESOTA, 1976-1977

### A. THE PREHEARING CONFERENCE PROCEDURE

The Minnesota Supreme Court began using prehearing conferences on September 20, 1976.<sup>18</sup> Appellants were required, when serv-

---

16. See Pollack, *Pretrial Conferences*, 50 F.R.D. 451, 453 (1970).

17. See Kaufman, *The Pre-Argument Conference: An Appellate Procedural Reform*, 74 COLUM. L. REV. 1094, 1094 (1974). See also Goldman, *The Appellate Settlement Conference: An Effective Procedural Reform*, STATE COURT J. (Winter 1978) (study concluding that the preargument conference has not reduced the Second Circuit's workload).

18. Original authority for the procedure was provided by the rules of civil appellate procedure as follows:

The Supreme Court may direct the attorneys for the parties to appear before the Supreme Court or a judge or a designated officer thereof for a prehearing conference to consider settlement, simplification of the issues, and such other matters as may aid in the disposition of the proceedings by the Supreme Court. The Supreme Court or judge thereof shall make an order which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel. Such order when entered controls the subsequent course of the proceeding, unless modified to prevent manifest injustice.

MINN. R. CIV. APP. P. 133.02 (1976) (repealed 1979). The procedure was set out in an implementing order:

A. Prehearing Conference Statement. With the service of the notice of appeal pursuant to Appellate Rule 103.01(1), or the filing of the writ pursuant to Appellate Rule 115.03(3), the appellant or relator shall serve on all other parties separately represented and transmit (with proof of service) to the prehearing judge a completed prehearing conference statement in the form attached hereto.

Within ten days after service of appellant's statement, the respondent shall serve on all other parties separately represented, and bring (with proof of service) to the Prehearing Conference, a Prehearing Conference Statement supplementing that of appellant in the particulars respondent deems to be of assistance to the Court.

B. Notice of Prehearing Conference—Duties of Parties. Following receipt of appellant's statement, the court shall schedule a Prehearing Conference pursuant to Appellate Rule 133.02 unless it notifies the parties to the contrary. The attorneys for the parties shall be notified of the time and place of the conference, which will be held promptly, before the record is transcribed and briefs prepared. Attendance at the conference by the attorneys shall be obligatory. They shall have full authority to reach settlements, limit issues and deal with such other matters as may aid in the disposition of the appeal. Upon receipt of the notice of Prehearing Conference, the attorneys shall make arrangements for their clients or their clients' insurers or indemnitors to be available at the time of the conference by telephone communication to approve matters requiring client approval. In divorce custody, alimony, and support cases, the clients may in some instances be required to accompany their attorneys to the hearing.

C. Transcript. In all cases subject to Rule 133.02, the 60-day period permitted the reporter for furnishing a transcript pursuant to Rule 110.02(2) shall not commence to run until entry of the Prehearing Conference Order or receipt of notice from the Court that a conference will not be held. The appellant shall notify the reporter of such order or notice.

D. Prehearing Conference. The Prehearing Conference shall be conducted by a justice of the Court or a hearing officer designated by the Court. The justice who conducts the conference shall not participate in any subsequent decisional process. No court personnel, attorney, party or any other person taking part in the conference shall make public or communicate to, or discuss with, anyone engaged in the decisional process any matters considered or divulged at the conference which do not subsequently appear in the Prehearing Conference Order.

E. Prehearing Conference Order. An order shall be entered following the conference and shall reflect only the procedures or disposition to which the parties have agreed as follows:

- (1) Dismissal of the appeal
- (2) Limitation of the issues
- (3) Continuation of the appeal unaffected by Rule 133.02
- (4) Adoption of any procedures appropriate to the purpose of Rule 133.02.

F. Sanctions. Failure of a party or his attorney to obey the foregoing provisions of this Order shall result in such sanctions as the Court may deem appropriate.

G. Exceptions. The provisions of this Order are not applicable to extraordinary writ proceedings pursuant to Appellate Rule 120.

Order of the Minnesota Supreme Court, September 10, 1976. [hereinafter cited as Order of 1976].

The rule and order have been recently revised. The rule now reads:

The Supreme Court may direct the attorneys for the parties to appear before a justice thereof for a Prehearing Conference to consider the application or nonapplication of Rule 133.01 settlement, simplification of the issues, and such other matters as may aid in the disposition of the proceedings by the Supreme Court. The justice shall ascertain whether or not the appeal should be decided, remanded, or dismissed pursuant to Rule 133.01, shall so recommend to the Supreme Court, and may participate in the decisional process of the Court with respect thereto. The justice shall make an order which recites the recommendations made pursuant to Rule 133.01 and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions or agreements of counsel.

MINN. R. CIV. APP. P. 133.02. The amended order reads:

A. Prehearing Conference Statement. Simultaneously with the service of the notice of appeal pursuant to Appellate Rule 103.01(1), or with the filing of the writ pursuant to Appellate Rule 115.03(3), the appellant or relator shall serve on all other parties separately represented, and transmit (with proof of service) to the clerk of Supreme Court a completed Prehearing Conference Statement in the form prescribed by the Court. The statement will not be treated as confidential.

Within ten days after service of appellant's statement, the respondent shall serve on all other parties separately represented and within three days thereafter file with the clerk of supreme court (with proof of service) a Prehearing Conference Statement supplementing that of appellant in the particulars respondent deems to be of assistance to the Court.

B. Notice of Prehearing Conference—Duties of Parties. Following receipt of appellant's statement, the Court shall schedule a Prehearing Conference pursuant to Appellate Rule 133.02 unless it notifies the parties to the contrary. The attorneys for the parties shall be notified of the time and place of the conference, which will be held promptly, before the record is transcribed and briefs prepared. Attendance at the conference by the attorneys shall be obligatory. They shall have full authority to reach settlements, limit issues, and deal with such other matters as may aid in the disposition of the appeal. Upon receipt of the notice of Prehearing Conference, the attorneys shall make arrangements for their clients or their clients' insurers or indemnitors to be available at the time of the conference by telephone communication to approve matters requiring client approval. The clients may in some instances be required to accompany their attorneys to the hearing.

C. Transcript. The appellant will not order a transcript until authorized by the Court to do so. Upon receipt of such authorization, the appellant shall, pursuant to Rule 110.02, notify the court reporter.

D. Prehearing Conference. The Prehearing Conference shall be conducted by a justice of the Court. Settlement discussions, if any, shall be confidential, otherwise the documents presented and discussions conducted will not be treated as confidential.

E. Prehearing Conference Order. The Prehearing Conference justice shall issue an order reciting the action taken at the Prehearing Conference and his recommendation, if any, pursuant to Rule 133. The justice may also recommend any other procedures appropriate to Rule 133.02 and the assignment of the appeal to En Banc, division, or non-oral consideration.

G. Exceptions. The provisions of this Order are not applicable to extraordinary writs pursuant to Appellate Rule 120.

ing notice of appeal or filing a writ in a civil matter (extraordinary writs excluded),<sup>19</sup> to also serve a prehearing statement on all other parties and to transmit a copy of the statement to the prehearing official.<sup>20</sup> The respondent and all other parties were then required to file a return statement.<sup>21</sup> The prehearing statement consisted of a form on which counsel supplied information identifying the case, the areas of law involved, the issues and outcome below and the issues presented for appeal, and any other additional information that might assist the parties in reaching a voluntary settlement.<sup>22</sup> In addi-

---

Order of the Minnesota Supreme Court, January 10, 1979. [hereinafter cited as Order of 1979].

Since this Note analyzes the prehearing conference only in its first year of operation, its discussion is based on the procedure under the 1976 rule and order.

19. Order of 1976, *supra* note 18, ¶ A.

20. *Id.* For an explanation of the "prehearing official" and his role, see notes 28-30 *infra* and accompanying text. Under the new order, the statement is to be transmitted to the clerk of court. Order of 1979, *supra* note 18.

21. Order of 1976, *supra* note 18, ¶ A.

22. The form used under the order of 1976 was as follows:

	STATE OF	
	MINNESOTA IN	
S. Ct. File No.	SUPREME COURT	Please complete and
	CIVIL APPEAL	Return to "Prehearing
	PREHEARING	Judge," 230 Capitol
	CONFERENCE	St. Paul, 55155
		no later than

---

1. Title of Case:

2. Names and Addresses and Telephone of Attorneys:

For Appellant or Relator:

For Respondent:

For Other Parties:

3. Court or Agency as to which Review is sought:

Name of Judge or Hearing Officer:

4. Type of Litigation (e.g., automobile negligence, products liability, malpractice, real estate, zoning, taxation, UCC, domestic matters, insurance, etc.):

5. Brief description of claims, defenses, issues litigated, and result below (do not detail evidence):

6. Nature of judgment or order as to which review is sought (appellant: attach copy of judgment or order as well as a copy of any memorandum, finding of facts, or conclusions of law of the court or agency below.) Order of 1976, *supra* note 18.

7. Issues proposed to be raised on appeal (attach any trial briefs which are relevant to these issues and which were submitted to the court or agency below. DO NOT PREPARE OR SUBMIT AN APPELLATE BRIEF OR TRIAL TRANSCRIPT FOR THE PREHEARING CONFERENCE):

8. This prehearing conference is designed to encourage the parties to reach a voluntary settlement before incurring the expense of securing a transcript and preparing and printing briefs, or if that is not possible, to limit the



tion, counsel were required to attach any trial briefs or other documents relevant to the issues raised on appeal.<sup>23</sup>

Prehearing conferences were held in all civil cases except those that the court had decided were not amenable to conference procedures because of their great social impact or other extraordinary circumstances.<sup>24</sup> Attendance at the conference was mandatory;<sup>25</sup> attorneys for the parties were required to come with full authority to settle, and were to make arrangements for their clients to be available by telephone for matters requiring client approval.<sup>26</sup> In some instances, the prehearing official directed that clients themselves attend the conference.<sup>27</sup>

The conferences were conducted by either a justice or an officer appointed by the court.<sup>28</sup> In order to ensure free discussion, the matters discussed in the conference were kept strictly confidential<sup>29</sup> and, if a justice conducted the conference, he was excluded from the court's later consideration of the case.<sup>30</sup>

The primary focus of the conference was to reach a voluntary settlement.<sup>31</sup> Nonetheless, other matters, including limitation and clarification of issues, were considered.<sup>32</sup> Some cases were remanded back to the lower court for fuller determination of facts.<sup>33</sup> All agreements were to be made by stipulation of the parties.<sup>34</sup> And, with the

---

issues. Please set forth succinctly any additional information which will assist the court and the parties in reaching an agreement to accomplish these ends. Information concerning settlement negotiations will be kept strictly confidential.

---

Signed \_\_\_\_\_ Date \_\_\_\_\_  
 TO BE EXECUTED BY THE ATTORNEY FOR APPELLANT OR  
 RESPONDENT WHO IS HANDLING THE APPEAL.

23. Order of 1976, *supra* note 18.

24. See Otis Address, *supra* note 8, at 6-7.

25. Order of 1976, *supra* note 18, ¶ B.

26. *Id.* In actual practice, counsel seldom came to the conference authorized to settle. The sanction generally applied when this situation occurred was to order that counsel appear at a second conference with their clients. Otis Address, *supra* note 8, at 14.

27. Order of 1976, *supra* note 18, ¶ B.

28. MINN. R. CIV. APP. P. 133.02 (1976) (repealed 1979). The new rule provides that only justices may conduct conferences. MINN. R. CIV. APP. P. 133.02.

29. Order of 1976, *supra* note 18, ¶ D. Under the new order only settlement discussions are confidential. Order of 1979, *supra* note 18, ¶ D.

30. Order of 1976, *supra* note 18, ¶ D. The new order, on the other hand, permits a justice to participate in the final disposition of cases for which he has conducted the prehearing conference. MINN. R. CIV. APP. P. 133.02.

31. Otis Address, *supra* note 8, at 14.

32. See MINN. R. CIV. APP. P. 133.02 (1976) (repealed 1979).

33. Otis Address, *supra* note 8, at 17.

34. Otis, *Prehearing Conferences—A Help or a Hindrance to Appellate Litigation*, HENNEPIN COUNTY LAW., Sept.-Oct. 1977, at 18, 20.

possible exception of narrowing issues, the conference official had no authority to render decisions that would affect the outcome of the case.<sup>35</sup>

To prepare for the conference, the presiding official reviewed the prehearing statements, trial briefs, and memoranda prepared by his clerk analyzing the questions of fact and law. The review was made without appellate briefs or transcripts, since neither were prepared before the conference.<sup>36</sup> During the course of the conference the presiding official typically invited the appellant and the respondent to give their versions of the issues; then he summarized what he believed would be the court's attitude toward the case.<sup>37</sup> The official usually provided an "educated estimate of the likelihood of reversal."<sup>38</sup> At some point, he "stressed the fact that 80% of [Minnesota Supreme Court] appeals are affirmed."<sup>39</sup> In a case he believed to be plainly without merit, the conference official could go even further and recommend that the respondent move for summary affirmance.<sup>40</sup> Following the conference, an order was issued reflecting the matters upon which the parties had agreed.<sup>41</sup> If no settlement was reached, the appeal proceeded in the regular manner.

#### B. THE CASE FOR AND AGAINST PREHEARING CONFERENCES

Advocates of the prehearing conference claim that it offers several benefits to the appellate court system, the most important of which is an increase in voluntary settlements. In theory, a greater number of settlements should reduce the court's caseload and permit

---

35. *Id.* at 18.

36. Otis Address, *supra* note 8, at 13.

37. *Id.*

38. *Id.*

39. *Id.* This method of discouraging appeals has been vigorously criticized as an example of the "gambler's fallacy" which confuses case probability with class probability. See William H. Adams III, Some Observations on the Minnesota Prehearing Conference, at 7 (May 4, 1977) (unpublished report) (on file at the *Minnesota Law Review*).

40. Otis, *supra* note 34, at 18. In certain cases the conference official's attempts to induce settlements may become quite extreme. Justice Otis stated that "on occasion we . . . use some pretty unsubtle language to describe the merits of the case such as 'if you insist on pursuing this appeal, counsel, I hope at the same time you keep up the payments on your malpractice policy.'" *Id.* at 20.

41. Order of 1976, *supra* note 18, ¶ E. The actual practice in the first year of conference operation was to issue an order only for remands or other action requiring formal disposition. In other instances, the conference officer simply sent a letter to the parties, summarizing the agreements reached or the decisions made at a conference. Otis Address, *supra* note 8, at 5.

The new conference procedures explicitly permit the presiding justice to recommend summary action. See MINN. R. CIV. APP. P. 133.01, .02.

it to spend more time deciding each case.<sup>42</sup> The conference is said to encourage settlements in a number of ways. First, by requiring that the parties come together in a neutral atmosphere to discuss settlement, the conference removes the problem of the party who is predisposed toward settlement but fears that any unilateral suggestion on his part would be seen by his opponent as an admission of weakness.<sup>43</sup> Second, the conference makes it simpler for the lawyer who believes his client's case is weak to advise settlement, because a neutral and authoritative figure like the conference official will have given that same advice.<sup>44</sup> Third, a recalcitrant party may become more amenable to settlement following a frank discussion by the conferees which alerts him to the weakness or futility of his case on appeal.<sup>45</sup> Fourth, settlement prospects are enhanced among parties who perceive the prehearing conference as their "day in court."<sup>46</sup> Finally, even the most litigious appellants are more likely to settle after not only their lawyers but supreme court justices advise them to do so.<sup>47</sup>

Proponents of the conference maintain that it offers other benefits to the parties as well. The fact that briefs and transcripts need not be prepared before the conference may save the litigants substantial amounts of time and money.<sup>48</sup> And even in those cases that do not settle at conference, the presiding official can focus counsels' attention on issues that the court will likely find dispositive. As a

---

42. See generally Otis, *supra* note 34, at 3; Kaufman, *supra* note 17, at 1102-03.

43. Mack, *Settlement Procedures in the U.S. Courts of Appeals: A Proposal*, 1 JUST. SYS. J. 17, 26 (1975). Cf. Kaufman, *supra* note 17, at 1095 (Pretrial conferences encourage parties to discuss settlement without fear of revealing weakness.).

44. See text accompanying notes 61-63, 77-83 *infra*. This possibility has been recognized in the federal pretrial conference setting. One federal district court judge has remarked:

I tell them, "this case is worth \$20,000 for the settlement," . . . and I tell them further to go tell their client that I said so. . . . [a]nd the funny thing is the lawyers in our district want . . . to be able to go back to their clients and have some of the load taken off their shoulders. They say, "this is what I think but the judge says this."

Wright, *The Pretrial Conference*, 28 F.R.D. 141, 145 (1961).

45. Otis, *supra* note 34, at 20

46. Mack, *supra* note 43, at 26-27.

47. See Otis Address, *supra* note 8, at 14.

48. See Order of 1976, *supra* note 18, ¶ B. Chief Justice Sheran has stated that [g]iven the 80-percent rate of affirmance in civil appeals, it is obvious that the time and money of most appellate litigants are being wasted, and their expectations frustrated. The civil appeal prehearing conferences are designed to, in the aggregate, reduce the waste of time, the waste of money, and the frustration and uncertainty of delay that inevitably accompany civil appeal.

Otis Address, *supra* note 8, at 14 (quoting Chief Justice Sheran of the Minnesota Supreme Court).

result, counsel may concentrate their efforts on those issues, producing higher quality briefs and more incisive oral arguments.<sup>49</sup>

There is, however, a disagreement among conference supporters over the important question of who should preside at the prehearing conference. Some favor a system that allows only justices to preside, while others feel that a system employing non-judicial officers of the court would be superior.<sup>50</sup> The former consider the prestige and experience of a supreme court justice essential to a successful conference. In their opinion, only the justices are familiar enough with the jurisprudence of the court and the dispositions of its members to accurately predict the outcome of cases.<sup>51</sup> Also, they believe that only justices command the respect necessary to persuade experienced members of the bar to settle cases they would ordinarily litigate, or to exclude issues they would normally argue.<sup>52</sup> Finally, they contend that the presence of a justice is vital to the substitute "day in court" effect that the conference offers.<sup>53</sup>

There are also several sound reasons that may be advanced for the use of non-judicial officers. Because such a system would not remove a justice from court to hear conferences, it assures a net saving of the court's time if settlements increase.<sup>54</sup> In addition, the danger of litigants being coerced into settlement may be less if an officer presides; attorneys who may unwillingly agree to settlement out of fear of offending a Supreme Court justice before whom they are likely to appear in the future<sup>55</sup> will not be burdened by such fears when a non-judicial officer presides. Finally, the use of non-judicial personnel eliminates the special problems that may occur when the prehearing conference procedures allow a justice to participate in the final decision of the same case for which he has conducted a conference.<sup>56</sup> In such a situation a justice may wish to preserve his image

---

49. See Otis Address, *supra* note 8, at 3-4.

50. In Minnesota, under the old conference rules, *see* note 18, both justices and non-judicial officers were allowed to preside. Under the amended rules, only justices may preside. *See id.*

51. See Otis, *supra* note 34, at 19 (few cases are so complex that a Supreme Court Justice can not grasp issues and predict outcomes).

52. See text accompanying notes 99-102 *infra*.

53. See generally note 46 *supra* and accompanying text. *But see* Mack, *supra* note 43, at 29 (non-judicial personnel may be able to create the "day-in court effect" to some extent).

54. If a justice presides for a number of conferences, it is possible that the amount of time that the court saves by virtue of the increased settlement rate could be outweighed by the amount of additional time spent preparing for and holding conferences; the result would be a net loss in judicial efficiency. This effect would be particularly burdensome if the settlement rate did not increase substantially.

55. See Adams, *supra* note 39, at 13.

56. While the original preconference procedure in Minnesota did not allow a

of neutrality and, therefore, refrain from taking an active role in settlement discussions<sup>57</sup> at the conference because of the possibility of an upcoming hearing. Counsel also may be hesitant to discuss the case candidly for fear that their remarks at the conference will adversely affect the justice's perception of the issues if the case goes to hearing.<sup>58</sup>

Critics of the prehearing conference are skeptical about the benefits claimed by its proponents. They maintain that the conference does not decrease, and may even increase, the strain on the appellate courts. One critic has suggested that prehearing conferences discourage settlement because their participants disregard the conference officials' advice, perceiving it to be motivated more by a desire to reduce the court's workload than to reach a fair result.<sup>59</sup>

Even if the conference does increase the rate of settlement it may not reduce the court's workload or speed the processing of cases. The prehearing conference adds another procedural step to the appellate process. Scheduling, preparing for, and holding pretrial conferences consume significant amounts of time. Also, at least in Minnesota, the conference effectively removes one justice from the court. Thus, both total case processing time and the number of cases that each justice must decide may actually increase as a result of the conference.<sup>60</sup>

It has been suggested that the cases most likely to settle at the conference are those having little merit, often involving non-appellable orders and issues of fact. Since they are the sort of cases that the court can quickly dispose of by summary action,<sup>61</sup> opponents of the conference argue that an increase in settlements gained only by the time-consuming process of holding a conference for each civil appeal, represents no real reduction in the court's workload, but rather a good deal of wasted effort.<sup>62</sup> Moreover, the conference may actually encourage the filing of meritless appeals; since briefs and transcripts need not be prepared beforehand, it provides a relatively inexpensive forum for attacking adverse lower court judgments.<sup>63</sup>

---

justice to take part in deciding a case for which he has conducted a prehearing conference, see Order of 1976, *supra* note 18, ¶ D, the new order makes no such disallowance. See Order of 1979, *supra* note 18.

57. Mack, *supra* note 43, at 28.

58. *Id.*

59. See Adams, *supra* note 39, at 8.

60. See Otis, *supra* note 34, at 19.

61. Summary action is authorized by Rule 133.01: "The Supreme Court, on its motion or on motion of any party may summarily affirm, may summarily reverse with appropriate directions, may remand or dismiss an appeal or other request for relief upon grounds proper for remand or dismissal, or may limit the issues to be considered on appeal." MINN. R. CIV. APP. P. 133.01.

62. See Adams, *supra* note 39, at 5-6, 9.

63. *Id.* at 8. See Order of 1976, *supra* note 18, ¶ B. A related problem is that of

Critics of the conference note a number of ways in which it might damage appellate courts' integrity and their image of impartiality. Perhaps most significant is the possibility of coercion by conference officials.<sup>64</sup> Also, when a presiding official predicts the outcome of a complex case, without the benefit of briefs or oral argument, participants may begin to believe that this is the court's usual method of operation. Furthermore, if a case proceeds to hearing and the prediction of the conference official is proven incorrect, the advice given by that official at future conferences may be disregarded. Of course, if parties rely upon, rather than disregard, a conference official's incorrect estimate, the situation may be even more serious.<sup>65</sup> Finally, some critics feel that judges should be totally removed from settlement discussions because such discussions demean the judicial process. It has been said that participation by a judge in settlement discussions causes him to "lay aside his judicial dignity and assume a role that has been irreverently characterized as black-robed haggler."<sup>66</sup>

Prehearing conferences may also be undesirable simply because of the added costs they impose on litigants. While the cost of attending a conference is low for parties who reside close to the conference site, the amount of attorney time and travel expenses required for outstate parties may be considerable.<sup>67</sup> This added expense may discourage outstate parties from filing meritorious appeals or cause them to settle cases they might otherwise pursue.<sup>68</sup>

---

the unscrupulous lawyer using the conference to harass the party who prevailed in the trial court and who will obviously prevail on appeal. The problem is exacerbated if the prevailing party or his attorney resides some distance away from the conference site. See notes 67-68 *infra* and accompanying text. The Minnesota court is aware of this problem. If a conference official perceives that a party is using the procedure in bad faith, he typically will advise the victim to make no concessions, and to file a motion for summary affirmance. See Otis, *supra* note 34, at 18.

64. See Otis, *supra* note 34, at 19; note 55 *supra* and accompanying text.

65. Adams, *supra* note 39, at 12. The problem, however, is not always severe. A presiding official has the benefit of the prehearing statement, copies of the trial briefs and other pertinent documents, a memo prepared by clerk, and his experience on the bench to guide him. Also, when an issue is complex the conference official typically qualifies his views by stating that he has not read the transcript and that his opinions are "at best only an educated guess." Otis, *supra* note 34, at 19.

66. Jenswold, *Pretrial Conferences*, 38 WIS. B. BULL. 35, 41 (1965) (quoting William H. Morrison). In Minnesota, the conference official rarely discusses dollar figures, but serves more as an advisor forcing counsel to analyze the merits of the appeal. See Adams, *supra* note 39, at 3-4.

67. Adams, *supra* note 39, at 10.

68. Cf. Otis, *supra* note 34, at 19 (burden on outstate litigants may suggest conference should not be mandatory in borderline cases). If, as conference proponents suggest, however, cases are not easily identified as unlikely to settle, see Otis Address, *supra* note 8, at 15, the policy of holding conferences for all cases may be justified. Even

### III. THE MINNESOTA SUPREME COURT PREHEARING CONFERENCE STUDY AND QUESTIONNAIRE

It is impossible to resolve the arguments for and against the prehearing conference by mere reflection. Virtually every theoretical benefit the conference offers can be squarely challenged or counterbalanced by potential disadvantages of the new procedure. Only objective, quantifiable data will permit accurate inferences concerning the system's success or failure. In order to produce such data, an empirical analysis was designed to assess the effectiveness of the Minnesota prehearing conference in its first year of operation. The data-gathering method employed consisted of two elements: a prehearing conference study and a prehearing conference questionnaire.

#### A. THE PREHEARING CONFERENCE STUDY

##### 1. *Overall Design*

The study was designed to compare various aspects of the appellate process in Minnesota for two periods, using a "before and after" method.<sup>69</sup> The "before," or Period I, group consisted of those civil cases filed between September 20, 1975 and September 19, 1976, the year immediately preceding the implementation of the prehearing conference. The "after," or Period II, group consisted of those civil cases filed between September 20, 1976 and September 19, 1977, the first year of the conference's operation. A full sample method was used: for both periods, every appealed civil case was included in the study.<sup>70</sup> The total sample size was 1,189 cases, 571 in Period I and 618 in Period II.

##### 2. *Data Collection and Evaluation Process*

Each case was computer-coded, insofar as the records allowed,

---

if the cost of attending the conference is substantial, that cost will be far outweighed by the savings realized if a favorable settlement can be reached since counsel will not have to prepare briefs and transcripts, or argue the case.

69. This method is not as accurate as a controlled study because factors other than the prehearing conference may have affected the appellate process between Periods I and II. A controlled study was not possible, however, because the prehearing conference was made mandatory in almost all civil appeals and, thus, no "control group" sample was available. *See generally* M. ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE* 16-20 (1964); Goldman *supra* note 17, at 5.

70. Extraordinary writ petitions were computer-coded but were excluded from the analysis because they were exempt from conference procedures. *See* Order of 1976, *supra* note 18, ¶ G.

for the factors relevant to this study.<sup>71</sup> Of course, given the confidential nature of the discussions at the prehearing conference, information concerning those discussions was unobtainable.<sup>72</sup>

The coded information was analyzed using a computer program known as the Statistical Package for the Social Sciences (SPSS).<sup>73</sup> SPSS provided extensive data manipulation capability. For example, a particular type of case could be deleted from the statistical analysis to see what effect its deletion might have. Moreover, categories could be combined and appropriate values assigned when data was missing from particular cases. This capability allowed the researcher to perform "best possible" and "worst likely" analyses. The SPSS subroutine called "crosstabs" facilitated the creation of tables displaying the relationship between several variables.<sup>74</sup> Another SPSS subroutine allowed computation of mean values for categories of data and allowed comparison of those means for Period I and Period II. The SPSS subroutine "CTAB" was used to analyze the interrelationships among the many variables involved in more complex comparisons.<sup>75</sup>

---

71. The primary sources of coded information were the register of actions and the case files. Conference information was obtained from the prehearing secretary's non-confidential records. Because the coding required fairly sophisticated interpretation of court records, three recent law school graduates were employed to assist. This research group allowed effective daily supervision of the data collection process, and ensured consistent and accurate coding. Coding began at the Minnesota State Capitol on October 27, 1978; it was completed on December 15, 1978.

During the entire process, cooperation and assistance was received from the deputy administrator, the prehearing secretary, the clerk, the court, and all its staff members. *The Minnesota Law Review* wishes to express its gratitude for their kind efforts. We extend special appreciation to the diligent research staff.

72. See Order of 1976, *supra* note 18, ¶ D.

73. See generally N. NIE, C. HULL, J. JENKINS, K. STEINBRENNER & D. BENT, *STATISTICAL PACKAGE FOR THE SOCIAL SCIENCES* (1975). While use of the SPSS package is a relatively simple matter for one familiar with basic computer operation, analysis of the data the package produces requires a good deal of statistical expertise. The authors are grateful for the extensive interpretive assistance provided by Dr. John Rogers of the California Polytechnic State University, San Luis Obispo. Dr. Rogers was a visiting post-doctoral associate at the University of Minnesota Applied Statistics Department during the course of this study.

74. Using "crosstabs," one could, for example, create a table listing the number and percentage of cases settling in Periods I and II, while controlling for the presence of a large money judgment.

75. CTAB performs calculations for log-linear model analysis of multidimensional cross classified categorical data. See generally, Y. BISHOP, S. FEINBERG & P. HOLLAND, *DISCRETE MULTIVARIATE ANALYSIS: THEORY AND PRACTICE* (1975). CTAB documentation is available from:

University Computer Center  
University of Minnesota  
Minneapolis, Minnesota 55455.



### 3. *Coding Design*

Working within the confines of the available data, factors that, hypothetically, had some bearing on the success of prehearing conferences were identified and assigned numerical values. For descriptive purposes these factors may be grouped into seven broad areas.

#### a. Disposition of the Case

Each case was coded according to its final disposition, primarily to determine the difference in the settlement rate between Period I and Period II. All possible forms of disposition were noted, however, so that any change in the rate of affirmances, reversals, remands, or the use of summary action could be detected.

#### b. Case Processing Time

Cases were coded for the length of time from filing to hearing and from hearing to decision, and for the total processing time. This was done to help ascertain whether the conference allowed the court to process appeals more efficiently.

#### c. Decisional Processes

The court's use of oral arguments, division hearings, and summary and per curiam opinions were noted to help determine whether the conference resulted in fuller consideration of those cases that did not settle.

#### d. Nature of the Case

It seemed likely that certain kinds of cases would be more responsive to prehearing conference procedures than others. Therefore, each case was coded for the general area of law involved, the court or agency from which the case originated, the disposition and amount of recovery below, the issue on appeal,<sup>76</sup> and the relief requested on appeal.

#### e. Status of the Parties

Parties to an appeal were identified as individuals, non-profit organizations, corporations, other businesses, or government agencies in order to help discern whether there was any systematic relation-

---

76. Unfortunately, the codes for "issue on appeal" were ill-defined, leading the authors to conclude that the results were unreliable. Thus, this Note makes no further mention of this code category.

ship between the status of the appealing parties and rates of settlement, and whether prehearing conferences had any effect on those rates. The appellant was also identified either as plaintiff or defendant below, and the presence or absence of multiple parties was noted.

f. Distance from the Conference Site

To help analyze whether the added cost imposed on outstate litigants by the conference affected their decisions to settle or pursue appeals, cases were coded for the distance the parties' attorneys had to travel to reach the conference site.

g. The Official Presiding

Cases in Period II were coded according to the status of the individual presiding at the conference. This allowed for a comparison between the rates of settlement achieved in conferences at which justices presided and those at which administrative officers presided. It also allowed the individual justices and officers to be compared against each other to see if their personal traits had any effect on settlement rates.

B. THE PREHEARING CONFERENCE QUESTIONNAIRE

The questionnaire was developed to determine the attitude of members of the Minnesota bar toward the prehearing conference in its original form, and to assess their impression of proposed changes in conference rules. Questionnaires were sent to a representative sample of attorneys who, according to court records, had participated in prehearing conferences. Tabulations of the responses to the questions were made and representative comments were noted.

IV. THE PREHEARING CONFERENCE STUDY: RESULTS AND ANALYSIS

A. THE EFFECT OF THE CONFERENCE ON CASE PROCESSING

1. *The Increased Settlement Rate*

The primary purpose of the prehearing conference is to reduce the court's caseload by encouraging settlements. If the conferences increase the number of cases that settle, the court should be able to give greater consideration to those cases that come before it, and the overall quality of appellate decisionmaking should improve. This inquiry began, therefore, with a determination of whether there had been any significant change in the rates of settlement between Periods I and II.

The inquiry was complicated by two problems. The first was that at the conclusion of the study there were 52 cases in Period II that had not reached final disposition; the most recently filed had been on the docket for 450 days. Since data from Period I indicated that a settlement rate of only 2.8% could be expected for cases of this vintage,<sup>77</sup> it was simply assumed that none of these remaining cases would settle. The second problem was separating out the settled cases from among all those that had reached final disposition. Formally settled cases were readily identifiable because they contained an entry in the record stating "dismissed by stipulation of the parties." There was another indeterminate-sized group of cases, however, that consisted of those informally settled without the filing of such a stipulation; these cases were among those that had been dismissed without opposing motions. This problem was met by using two different methods for calculating the settlement rates in Periods I and II: the

---

77. The study showed that the longer a case stayed on the docket, the less likely it was to settle.

#### Period I

Length of time case on docket (days)	Number of cases reach- ing time period	Number of cases settling in time period	Percent of cases settling in time period
0 - 49	520	91	17.5
50 - 149	487	82	16.8
150 - 299	396	39	9.8
300 - 449	290	12	4.1
450 - 599	108	3	2.8
600 - 749	14	1	7.1
750+	0	0	0

#### Period II

Length of time case on docket (days)	Number of cases reach- ing time period	Number of cases settling in time period	Percent of cases settling in time period
0 - 49	553	166	30.0
50 - 149	482	136	28.2
150 - 299	338	44	13.0
300 - 449	242	9	3.7
450 - 599	92	2	2.2
600 - 749	51	0	0
750+	0	0	0

Data for Period II is incomplete because of cases still pending at the time the study was completed.

first method assumed that both formally settled cases and those dismissed without opposing motions had been settled; the second assumed that only those cases with formal stipulations had been settled.<sup>78</sup>

Both methods showed a statistically significant<sup>79</sup> increase in the rate of settlement following the implementation of prehearing conferences. Under the first method, the settlement rate rose from 27.9% in Period I to 39.6% in Period II, a difference of 11.7%. Under the second method, the settlement rate climbed from 17.4% to 30.1%, a difference of 12.7%. For the remainder of this analysis, the settlement increase rate of 12.7% will be used since it was based on the more statistically and logically reliable assumption.

A 12.7% settlement increase rate, however, does not necessarily lead to the conclusion that the prehearing conference has reduced the court's caseload, or has allowed the court more time to consider non-settling cases, because the figure is misleading in two respects. First, the conferences, as conducted in 1976-1977, effectively removed one member from the court.<sup>80</sup> It is possible that the increased settlement rate did not offset this loss. Second, if, as its critics contend, the conferences encourage litigants to file meritless appeals the higher settlement rate may simply reflect the fact that the conferences disposed mainly of these cases.

---

78. As a practical matter, both methods of calculation showed about the same results. This is because the category of cases including non-opposed motions to dismiss varied a mere 0.9% between Periods I and II.

79. "Statistical significance" refers to a concept that provides a method of measuring the extent to which an observed change is due to random (unexplained) variation. Thus, if results are statistically significant at the .10 level, then it means that the observed result could be expected to occur 10 times in 100 simply by random chance. The typical cut-off figure for statistical significance in social science work, and the one used in this study, is .05. This means that an observed change is "significant" only if the probability of its random occurrence is 5% or less. The statistical significance test, therefore, is simply a method of determining when the probability of an observed change having been caused by random variation is so low that a statistician is justified in inferring that the change was in fact caused by non-random factors such as, for example, the imposition of a prehearing conference system.

80. See Adams, *supra* note 39, at 9 ("The costs imposed on the legal system by the Minnesota procedure involves the time of one judge . . . which is devoted to every case . . .").

TABLE 1: SETTLEMENT RATES

	Period I* cases settled	Percent	Period II** cases settled	Percent	Difference between Period II and Period I
Method 1†	146	27.9	220	39.6	11.7
Method 2††	91	17.4	167	30.1	12.7

\* No prehearing conferences held: Sept. 20, 1975 to Sept. 19, 1976.

\*\* First year of conferences: Sept. 20, 1976 to Sept. 19, 1977.

† Formal stipulations and unopposed motions to dismiss both assumed to indicate settlement.

†† Formal stipulations only assumed to indicate settlement.

To help remove these ambiguities, three additional factors were analyzed: the form of argument, the form of hearing, and the form of opinion. It was hypothesized that an increased use of oral arguments, en banc hearings, or fuller opinion types would indicate that the prehearing conference had given the court more time to consider those cases that had not settled.<sup>81</sup> The data showed that, in Period II, oral arguments were used in an additional 3.2% of the cases.<sup>82</sup> The rate for en banc hearings, however, was 6% lower in Period II. As indicated in Table II, there was a slight increase in the use of fuller opinion types; this result, however, was not statistically significant.<sup>83</sup>

TABLE 2: OPINION TYPES

		Period I	Period II
Majority with at least one dissenting or concurring opinion	Number	20	16
	Percent	6.0	7.5
Majority with no dissenting opinion	Number	191	127
	Percent	57.5	59.3
Per curiam	Number	100	62
	Percent	30.1	29.0
Summary	Number	21	9
	Percent	6.3	4.2

81. Justice Otis has stated that the prehearing conference procedure was adopted so "that some day we may again hear all cases en banc as we did when I first came to the court, [and] we can scrutinize one another's opinions with constructive criticism or dissent." Otis Address, *supra* note 8, at 4.

82. The number of cases argued orally, either before the court en banc or before a division of the court, increased from 68.8% in Period I to 72.0% in Period II.

83. The level at which these results become significant is .5. This means that there is a 50% likelihood that the observed increase in fuller opinion types is attributa-

## 2. Case Processing Time

A second purpose of prehearing conferences is to reduce the delay that litigants face between the time they file their appeal and the time it is finally disposed of by the court.<sup>84</sup> To determine whether the conferences were effective in reducing that delay, the average case processing time for Periods I and II were compared.

The 52 cases that had not reached final disposition prior to the conclusion of the study<sup>85</sup> once again presented a problem because the times between their filings to final disposition could not be calculated. Therefore, a "best possible/worst likely" method of analysis was employed to calculate an upper and lower limit for average case processing time in Period II. The "best possible" approach assumed that all pending cases reached final disposition on December 11, 1978, the final day of the study. The "worst likely" approach assumed that each pending case would take as long to reach final disposition as the case taking longest to do so in Period I: 740 days.

The "best possible" approach showed the average case processing time decreasing from 308 days in Period I to 256 days in Period II; the "worst likely" approach showed a decrease of 36 days. These figures, however, may have been misleading because the sample used included all matters filed. It is possible that the observed reduction in average case processing time merely reflected an increased number of frivolous appeals, encouraged by the conference procedures, which were quickly disposed of by dismissal, settlement, or summary action. To test this possibility, cases dismissed, settled, or disposed of by summary action were removed from the analysis and the average case processing time was determined only for the group of cases in Periods I and II for which majority or per curiam opinions were written. A "best possible/worst likely" method was again employed to deal with the problem presented by pending cases. Both methods indicated a decrease in average case processing time from 405 days in Period I to 382 days in Period II.<sup>86</sup>

---

ble to factors other than the prehearing conference. *See* note 79 *supra*. Statistical significance, however, is merely a tool used by statisticians to help them assess the strength of their statistical inferences; it certainly is not a conclusive measure. The data generated on fuller opinion types by this study, though not statistically significant at the .05 level within an acceptable level of error, was consistent in showing trends in the same direction. This fact lends some credence to the proposition that the observed increased use of fuller opinion types was due to the implementation of prehearing conferences.

84. *See* notes 4-6 *supra* and accompanying text.

85. *See* note 77 *supra* and accompanying text.

86. Although it is a pure coincidence that both methods of calculation produced identical results, it is not surprising that both methods would produce similar results.

## B. THE DYNAMICS OF CASE SETTLEMENT

### 1. *Amenability to Settlement*

At the outset of this study, it seemed likely that the prehearing conference might be more effective in encouraging settlement in certain types of cases than in others. If these types of cases could be identified, the Minnesota Supreme Court might limit the mandatory prehearing conference to these cases, and eliminate or make optional the conference where settlement prospects had proven low. Therefore, the study isolated certain factors that seemed likely to make a case more or less responsive to a prehearing conference.

#### a. Court or Agency Below

The settlement rate for cases appealed from verdicts or judgments in the district courts showed a positive difference between Period I and II of approximately 12.7%. This figure is virtually the same as the average rate observed for the study's entire sample.<sup>87</sup> Appeals taken from decisions by the Workman's Compensation Board, however, showed a 16.5% positive difference.

#### b. Disposition of the Case Below

It was hypothesized that the tendency of the conference to increase settlement rates in cases appealed from trial courts might vary according to whether a case had been disposed of without trial or had been appealed from a full trial before a judge or jury. Thus, if litigants perceived judgments entered into after trial as being less susceptible to reversal than dismissals of complaints and summary judgments, the prevailing parties in appeals from judgments entered after a trial might be less willing to settle. The data was to some degree consistent with this hypothesis. The settlement rate for appeals taken from judgments entered after trial increased from 18.7% in Period I to 27.4% in Period II. The settlement rate for appeals from summary judgments and other dispositions without trial increased from 9.6% to 24.6%. Although this result indicates the propensity of the conference to increase the settlement rate of appeals from dispositions without trial, it does not suggest that conferences should be used only for such cases.<sup>88</sup>

---

The long processing time for cases in which an opinion is written tends to minimize the effect of the 740 day "worst case" assumption.

87. The difference between the settlement rate of cases appealed from the district courts and the overall settlement rate for all appeals was not statistically significant.

88. Even though the increase in settlements witnessed in cases appealed from

It also seemed probable that interlocutory appeals would be less likely to settle than appeals from final judgments because the opportunity to litigate the longer issues at trial depends on the success of the interlocutory appeal. No such tendency, however, was discovered.

c. The Plaintiff's Request for Relief

When the information was available,<sup>89</sup> the plaintiff's request for relief was categorized either as monetary, declarative, or injunctive. It seemed likely that conference participants in cases in which monetary relief was sought would respond more favorably to the pressure for settlement because the conduct of the litigants is more likely to be a function of purely economic factors. Also, cases involving money judgments allow the parties greater flexibility in bargaining than do requests for declaratory or injunctive relief.

The study at least partially confirmed this expectation. In cases in which the relief sought was primarily monetary, the settlement rate increased from 12.6% in Period I to 27.3% in Period II, a difference of 14.7%. Even in cases in which declaratory relief was requested, however, there was an 8.1% positive difference observed between settlement rates in Period I and Period II. Unfortunately, the cases in which injunctive relief was requested constituted too small a portion of the sample to permit a statistically reliable conclusion.

d. Amount of Money Judgment

If the transaction costs of appealing from a money judgment begin to increase in disproportion to the expected gain that may result from the appeal, the decision to settle becomes an economically mandated alternative.<sup>90</sup> Thus, because there are certain fixed transaction costs that attend any appeal, it seemed plausible that cases involving smaller claims would be more likely to settle.<sup>91</sup>

---

dispositions without trial, from 9.6% to 24.6%, far exceeds the increase of from 18.7% to 27.4% observed in appeals from judgments entered after trial, it should be noted that the Period II settlement rates for both categories, 24.6% and 27.4% respectively, are very similar. Since the prehearing conference seems to have driven both categories to a common settlement level, it could be argued that neither category should be favored over the other in the future allocation of prehearing conference time.

89. If the type of relief requested was not readily discernible from the records being used, the researchers were instructed to enter no information. The sample for this particular analysis, therefore, is somewhat smaller than the overall sample size; a total of 946 cases were considered as opposed to 1073 cases in the overall sample.

90. Judge Kaufman noted a similar trend in his report on prehearing conferences in the Second Circuit Court of Appeals. See Kaufman, *supra* note 17, at 1100.

91. See Mack, *supra* note 43, at 17-26.



The study confirmed this theory. For those cases in which the amount of monetary damages obtained at trial was less than \$10,000, the settlement rate rose significantly from 15.0% in Period I to 45.2% in Period II, a positive difference of 30.2%. For cases in which the amount of damages exceeded \$10,000, the settlement rate showed some variation, but no meaningful trend was discernible.

e. Number of Parties to the Appeal

It seemed likely that as the number of parties involved in an appeal increased, the probability of arriving at a settlement with terms satisfactory to all would decrease in some corresponding fashion. Because of practical limitations, the sample was divided into only two groups: those in which there were two parties to the appeal and those in which there were more than two parties. It was thought that the presence of more than two parties might serve to identify complex cases that would be less likely to settle. The statistical evidence supported this proposition. In Period I, the settlement rate for cases involving two parties was 18.9%, but it was only 16.5% for cases involving more than two parties. In Period II, the settlement rates rose to 29.5% in two-party actions, and 30.5% in actions where more than two parties were involved. These figures represent positive differences of 10.6% and 14.0%, respectively.

Although it is interesting that the conference seems to have had a greater impact on actions involving more than two parties, the results do not point to any significant overall difference. The observed differentials of 10.6% and 14.0% do not vary widely enough from the average settlement rate of 12.7% to have any practical implications for the alteration of future conference procedures.

f. Status of the Parties

The two main parties to each appeal were categorized as either private individuals, non-profit organizations, business corporations, other businesses, or governmental units. It seemed that the ability of these groups to obtain funds for appellate litigation might vary significantly, and that prehearing conferences might accentuate such differences. In other words, the more funds a party has available for litigation, the less willing it may be to settle, since the expense of participating in a hearing is not so important a consideration.<sup>92</sup> On the other hand, the conference may actually serve to mute rather than accentuate this effect. The conference may serve to diminish the

---

92. This general assumption is analogous to one made in a Yale study of state supreme court reversal rates. See Note, *supra* note 10.

economic inequality of parties by relieving them of the expense of preparing briefs and oral arguments. The power of wealthier parties to inflict economic intimidation by refusing to settle would be greatly diminished in cases in which the presiding official advises the opponent that a strong case exists in the opponent's favor.

The data did not, however, reveal any such trends. The settlement rates for each available combination of parties increased at approximately the same rate as the average overall rate of 12.7%. To the extent that there were differences, no inferences were drawn because of the small sample sizes in many of the categories.<sup>93</sup>

#### g. Distance from Conference Site

It seemed likely that outstate parties whose attorneys had to travel long distances would be more likely to settle than would parties living relatively close to the conference site. If such an increase were observed, it would suggest that the conference had unfairly allocated its burden and, therefore, unfairly dissuaded outstate parties from pursuing their appeals. To test this hypothesis, the distance that each attorney had to travel was analyzed. Surprisingly, the data indicated no significant relationship between the distance parties must travel and their rate of settlement.

#### h. Area of Law

There seemed to be ample reason to believe that cases involving certain areas of law would be more amenable to conference procedures than others. For instance, a case involving the amount of an admitted tax liability would certainly be more suited to compromise than one involving the constitutionality of a state statute. To help study this question, the cases in the sample were grouped into 45 areas of law; the cases were also grouped under 18 broader headings.<sup>94</sup>

As with the distance analysis, this breakdown produced virtually no meaningful data; in all the studied areas of law, with one exception, the difference in settlement rates between Periods I and II was close to the overall average settlement rate increase of 12.7%.<sup>95</sup> The

---

93. A hierarchical, log-linear model constructed with SPSS' "CTAB" program confirmed that the introduction of pretrial conferences did not influence the interaction between the status of the litigating parties and the ultimate disposition of the case.

94. The headings used were (1) Contracts, (2) Real Property, (3) Torts-Personal Injury, (4) Torts-Personal Property, (5) Civil Rights, (6) Labor, (7) Taxes, (8) Public Interest, (9) Statutes, (10) Unfair Competition, (11) Family Law, (12) Workman's Compensation, (13) Trusts & Estates, (14) Zoning, (15) Attorney Regulation, (16) Medical Malpractice, (17) Licensing, and (18) Other.

95. Because of the small sample sizes for these categories, all observed variation

one exception occurred in the area of family law,<sup>96</sup> where the settlement rate actually dropped from 30.6% in Period I to 25.5% in Period II.<sup>97</sup> There is no readily apparent explanation for this phenomenon.<sup>98</sup>

## 2. *Relationship Between Settlement and the Presiding Officer*

### a. Presiding Justices

Since the presiding justice plays a leading role in settlement discussions and assessments of the probable outcome of cases, it was thought that the personality and technique of the presiding justice might influence settlement rates. The settlement rates of each justice who participated in conferences was, therefore, analyzed. Although the sample sizes for conferences held by justices other than Justice Otis are small, and thus of questionable reliability, one trend did emerge. In Period II, Justice Todd settled 5.6% more of his cases than Justice Otis.<sup>99</sup>

Justice Otis explained that while "some judges by the nature of their personalities press harder than others for bringing about a settlement" his approach "falls on the side of gentle persuasion which may not be quite so effective."<sup>100</sup> Justice Todd, on the other hand, is considered by some to be more forceful in his attempts to encourage a settlement. Thus, there is at least some evidence to support the proposition that the personality and technique of the presiding justice is an important aspect of the conference's ability to produce settlements.

---

was rendered statistically insignificant. In the tax case category, for example, the data showed a positive difference in settlement rates of 23.3% between Periods I and II. But because the tax case sample was composed of only 59 cases, it became significant only at the .084 level; this level was far beyond the .05 level that had been chosen as the minimum level of statistical significance for judging data generated by this study. See note 79 *supra*.

96. The category of Family Law was composed of three subcategories: (1) Divorce/Dissolution, (2) Child Custody, and (3) Other Family Law.

97. This drop in settlement rates was statistically significant at the .05 level. See note 79 *supra*.

98. In a study of this size and complexity, it would be unusual if some statistical anomaly did not occur.

99. Justice Todd obtained settlement at 36.4% of his conferences, while Justice Otis' rate was 30.8%. Any conclusion drawn from these figures, however, must be tempered by the fact that Justice Otis presided over 225 conferences while Justice Todd presided over only 33. The low number of cases in Justice Todd's sample means that the settlement figure obtained, 36.4%, is a far less reliable indicator of his ability to influence settlement than Justice Otis' 30.8% figure.

100. Otis Address, *supra* note 8, at 18.

#### b. Judicial or Non-judicial Presiding Officer

The settlement rates occurring under Justice Otis and Commissioner Richard Leonard, a non-judicial officer, were compared to see if any significant difference existed.<sup>101</sup> The rate of settlement under Mr. Leonard was 23.6%<sup>102</sup> while under Justice Otis it was 30.8%. Of course, this 7.2% difference may be a function of their different personalities and techniques. But, given that Justice Otis considers himself to be a gentle persuader and not an aggressive mediator, the difference also supports the conclusion that Supreme Court justices, because of their prestige and presumed knowledge of the court's workings, are better equipped to encourage settlements than are non-judicial officers of the court.

This information does not fully answer the question of who should preside at prehearing conferences. Since justices are effectively removed from the court when preparing for and conducting prehearing conferences, the issue is whether the marginally higher settlement rate they produce justifies the time investment required to produce it. It is equally possible that a more efficient solution would be to leave the justice on the bench where his productivity may more than offset the disadvantages of having the conference administered by a non-judicial officer.

### V. THE PREHEARING CONFERENCE QUESTIONNAIRE: RESULTS AND ANALYSIS

The questionnaire was designed to discover the attitudes of members of the Minnesota bar toward the prehearing conference during its first year of operation, and to elicit their impressions of proposed changes in the conference rules.<sup>103</sup> Questionnaires were sent to 238 attorneys who had participated in conferences during the year, and 163 replies were received. Because many of the attorneys responding to the questionnaire had attended more than one conference, the 163 replies actually covered 510 conferences.<sup>104</sup> To encourage

---

101. The comparison of Mr. Leonard's settlement rate with that of Justice Otis was the most meaningful since both had presided over a substantially larger number of conferences than had the other members of the court. Since cases were assigned to conference officials virtually at random, there appears to be little chance that the observed settlement rates were biased by unknown factors.

102. Mr. Leonard's sample included several pending cases. For the purposes of this comparison, it was assumed that none would settle. If, on the other hand, it had been assumed that all would settle, Mr. Leonard's settlement rate would have increased only from 23.6% to 26.6%.

103. The proposed changes in conference rules have now, for the most part, been enacted. See Order of 1979, *supra* note 18.

104. The average responding attorney had attended 3.12 conferences.

candid responses, the attorneys polled were assured that respondents' names would remain confidential.

#### A. ATTITUDE OF THE BAR TOWARD PREHEARING CONFERENCES DURING THE FIRST YEAR OF OPERATION

##### 1. *Settlement*

a. Question: How many of the cases [in which you participated in prehearing conferences] settled prior to formal hearings?

<u>Number of cases</u>	<u>Percent of total cases</u>
120	23.53

b. Question: Of those cases which settled, in how many do you feel that the prehearing conference was a significant factor?

<u>Number of cases</u>	<u>Percent of total settling cases</u>
103	85.83

c. Question: Do you feel the prehearing conference has significantly increased settlement negotiations in those cases appealed to the Minnesota Supreme Court?

<u>Number responding</u>	<u>Percent</u>
Yes — 65	42.21
No — 52	33.77
No opinion — 37	24.02

##### 2. *Narrowing and Clarifying Issues*

a. Question: In cases that did not settle, do you feel the conference was effective in narrowing and clarifying issues, thus producing better briefs and arguments? If so, in how many cases?

<u>Number responding</u>	<u>Percent</u>
Yes — 55	39.57
No — 84	60.43

<u>Cases in which issues were narrowed or clarified</u>	<u>Percent of total cases in survey</u>
84	16.47

The response to this question indicates that the legal community does not regard the conference as especially effective in narrowing or

clarifying issues. Judging from the low number of cases listed, it is apparent that many lawyers who found the conference effective for some cases did not find it effective for all. Some of the comments accompanying the responses help explain the small number of positive answers. One practitioner suggested, for example, that he did not feel any conference officer could dissuade an attorney from briefing an issue that the attorney was "bent on presenting to the court."<sup>105</sup> Another indicated that while the conference did not result in any issues being excluded from briefs in any of the appeals in which he had participated, oral argument often did focus on the issues recommended by the presiding official. A few of the responding attorneys indicated that because the presiding official was unprepared, no clarification or narrowing of issues was possible at the conference. The overall reaction of the responding attorneys, however, does seem to indicate that conference proponents may be guilty of overstatement when they claim that the conference helps narrow issues and "streamline unsettled cases for adjudication."<sup>106</sup>

b. Question: Were issues ever excluded from argument without your agreement? If so, in how many cases?

<u>Number responding</u>	<u>Percent</u>	<u>Number of cases in which issues excluded</u>	<u>Percent of total cases in survey</u>
Yes — 3	1.9	3	0.58
No — 155	98.1		

This response indicates that it is extremely rare for the conference to narrow issues without the consent of counsel for all parties. Nonetheless, it is surprising that any attorney responded that issues were narrowed without his or her agreement; actions taken at the conference are to be by stipulation of the parties only. One member of the court indicated, however, that he considers narrowing of issues an exception to the normal rule.<sup>107</sup> The responses confirm that the exception is rarely used.

### 3. *Prediction of Outcome on Appeal*

a. Question: Has the officer presiding at one of your conferences ever predicted the outcome of your case at the prehearing conference? If so, in how many cases?

105. This response and all other questionnaire responses are on file at the offices of the *Minnesota Law Review*.

106. See Kaufman, *supra* note 17, at 1094.

107. See Otis, *supra* note 34, at 18.

<u>Number responding</u>	<u>Percent</u>
Yes — 115	71.87
No — 45	28.13
<u>Number of cases in which prediction made</u>	
174	
<u>Percent of total cases in survey</u>	
34.12	

b. Question: In instances where the conference officer predicted the outcome of your case at the prehearing conference and the case subsequently went to hearing, how often was the prediction [incorrect]?

<u>Number of incorrect predictions</u>	<u>Percent of total cases in which predictions were made</u>
26	14.94

The response to question "a" indicates that it is common for hearing officers to predict the outcome of cases. The comments on this question reveal that the presiding officer may have alluded to the final outcome of the case, even if not making a formal prediction, more often than the 71.87% figure indicates. Many of the responding attorneys stated that the officer had not predicted the outcome of their case simply because "predict" was too strong a word; rather, the officer's views had often taken the form of a "ballpark estimate" or "weatherman's forecast."

The response to question "b" suggests that there is some justification for the conference critics' concern over the loss of respect for judicial decisionmaking brought about by incorrect predictions.<sup>108</sup> While it is possible that the 14.94% figure is high due to various factors in the survey methodology, the comments clearly indicate that predictions were incorrect in at least some cases. Even though the number of incorrect predictions is not high, the possible detrimental effect they may have on the attitude of the legal community toward prehearing conferences requires that presiding officers continue to inform counsel that any predictions are made on the basis of an incomplete record, and it is possible that the full court will not behave in the predicted manner.

---

108. See text accompanying notes 59-63 *supra*.

#### 4. *Helpfulness in Evaluating Merits of Appeal*

Question: Did the views expressed by the presiding justice or officer enable you to better evaluate the merits of your appeal?

<u>Number responding</u>	<u>Percent</u>
Yes — 88	56.05
No — 69	43.95

The positive response to this question was unexpectedly high. It suggests that the conference official was often able to help attorneys understand the probable attitude of the court toward their appeal. The comments to this question indicate that some attorneys rely to a great extent on the presiding official's assessment of the merits if that official is a justice; many indicated they would strongly consider dropping a case if the justice's comments were unfavorable. Another group indicated that the views of the conference officers were helpful mainly in allowing their clients independently to evaluate the merits of the appeal. One attorney commented, for example, that in one of his cases the views of the conference officer allowed him to give his client convincing reasons for dismissing a "longshot" appeal while ensuring the client that all reasonable remedies had been pursued. Some of the comments indicated that the presiding official's views gave attorneys additional support for their own positions. Others indicated that the official's views were helpful to their opponent's position, but not to their own.<sup>109</sup>

#### 5. *Pressure Applied by the Conference Officer*

Question: Do you feel the presiding conference justice or officer applied undue pressure to force settlement? If so, in how many cases?

<u>Number responding</u>	<u>Percent</u>	<u>Number of cases in which pressure applied</u>	<u>Percent of total cases in survey</u>
Yes — 21	13.04	29	5.68
No — 140	86.96		

The low positive response rate to this question indicates that, in a system in which the conference official is not empowered to force agreement, the concern over the possible use of coercive tactics by conference officials is largely unfounded. Some of the comments on

---

109. "I fully understood the merits of my case—however my opponent didn't and I'm sure the [conference] officer was of assistance to him." Questionnaire no. 6 (on file at the *Minnesota Law Review*).



this question reflected the view that the undue pressure that did exist was inherent in the conference setting and not something brought about directly by the presiding official. Some commenting attorneys cited the extra expenses caused by the conference, and the fact that conference officials were free to comment on the merits of the cases, as examples of the types of indirect pressures, inherent in the conference setting, that "force" litigants toward settlement. Two others felt that the presiding official had acted coercively by requiring them to appear at a second conference<sup>110</sup> even though this procedure is explicitly provided for in the conference rules.

#### 6. *The Presiding Official*

a. Question: Do you feel, in general, that the prestige of a Minnesota Supreme Court Justice significantly adds to the efficiency of the prehearing conference?

<u>Number responding</u>	<u>Percent</u>
Yes — 124	77.02
No — 37	22.98

b. Question: Do you feel, in most cases, a knowledgeable officer appointed by the court would be just as effective as a Minnesota Supreme Court Justice?

<u>Number responding</u>	<u>Percent</u>
Yes — 43	27.04
No — 116	72.96

By their answers to these questions, the majority of responding attorneys revealed their belief that judicial officers are more effective conference officials. The choice of whether judicial or non-judicial officers should be used in future conferences, therefore, must reflect a consideration of this subjective factor in addition to the comparative settlement rates observed for the two types of officials, and the comparative costs involved.

#### 7. *General Attitude Toward the Prehearing Conference*

a. Question: Do you feel the prehearing conference is, overall, a fair and just proceeding?

---

110. The "Justice in charge set another prehearing conference and demanded that I produce my client when I would not yield to his settlement attempts at the first conference." Questionnaire no. 54 (on file at the *Minnesota Law Review*).

<u>Number responding</u>	<u>Percent</u>
Yes — 138	87.90
No — 19	12.10

b. Question: Do you feel the conference should be continued, but made optional, or discontinued?

<u>Number responding</u>	<u>Percent</u>
Continue — 100	63.45
Optional — 32	20.12
Discontinue — 27	16.43

Thus, despite their occasional negative sentiments,<sup>111</sup> members of the Minnesota bar seem overwhelmingly to agree that the conferences are fair and should be continued. The comments of those attorneys who thought the conferences were unfair and should be made optional or discontinued emphasized the costs that prehearing conferences add to the appellate process, especially for outstate litigants.<sup>112</sup>

#### B. THE BAR'S IMPRESSION OF THE PROPOSED CHANGES IN CONFERENCE RULES

The questionnaire included five of the most noteworthy proposals for changing the then-existing conference procedures. These proposals have now been embodied, in substantial part, in the new conference rules.<sup>113</sup> Participating attorneys were asked to indicate their approval, disapproval, or lack of opinion.

---

111. "It's all a waste of time." Questionnaire no. 244 (on file at the *Minnesota Law Review*).

112. Some comments by survey respondents follow:

The expense of travel to St. Paul, using a full day of time, in our opinion is unwarranted. As an alternative, the Justice could examine the file and write a letter warning them of the probable pitfalls and suggesting they explore settlement. Such a letter could be shown to each client and perhaps with better results than a recital to the client of the verbal warning received at the [conference].

Questionnaire no. 136 (on file at the *Minnesota Law Review*).

Consideration should be given to whether the presence of low-income clients should be excused when the travel expense is burdensome—my client was not required to attend, and simply could not have afforded to attend, with a 600+ mile trip.

Questionnaire no. 64 (on file at the *Minnesota Law Review*).

113. See note 18 *supra*.

### 1. *The Presiding Official*

Statement: The proposed rule provides only for justices holding prehearing conferences; officers of the court would no longer be authorized to do so.

<u>Number responding</u>	<u>Percent</u>
Approve — 118	73.75
Disapprove — 22	13.75
No opinion — 20	12.50

The great number of positive responses to this proposal is in accord with what has already been observed: Justices conduct conferences more effectively than appointed officers. It also indicates that the legal community's continued approval of the conference may depend on justices, rather than non-judicial officers presiding.

### 2. *Relationship Between the Presiding Justice and Other Members of the Court*

Under the original conference rules, a justice was not allowed to communicate with other court members in regard to cases he had presided over in prehearing conferences. The proposed rule would allow justices who had presided at conferences to become integrally involved in the ultimate disposition of those cases.

a. Statement: Under the proposed rule the prehearing conference statement and conference discussion would no longer be treated as confidential.<sup>114</sup>

<u>Number responding</u>	<u>Percent</u>
Approve — 38	23.60
Disapprove — 99	61.49
No opinion — 24	14.91

b. Statement: Under the proposed rule the justice presiding over the conference for a case will no longer be disqualified from sitting on that case, although he will not write the opinion.<sup>115</sup>

---

114. Under the new rule as enacted, settlement discussions are still treated as confidential, but the prehearing conference statement and other discussions are not. See Order of 1979, *supra* note 18, ¶ D. One of the justifications for this change is that it permits the clerk of court to process prehearing statements. Before the change in rules, statements had to be filed with the presiding justice's secretary.

115. The new rule, as enacted, not only permits the justice presiding at the conference to sit with the court, but also fails to prohibit him from writing the court's opinion. See MINN. R. CIV. APP. P. 133.02.

<u>Number responding</u>	<u>Percent</u>
Approve — 62	38.99
Disapprove — 89	55.97
No opinion — 8	5.03

c. Statement: The proposed rule states that the presiding justice may recommend in his Prehearing Conference Order that the court summarily affirm or reverse the lower court. This is opposed to the old rule under which there was no communication between the conference officer and the court.

<u>Number responding</u>	<u>Percent</u>
Approve — 59	36.20
Disapprove — 99	60.74
No opinion — 5	3.06

d. Statement: The justice may, under the proposed rule, decide whether the case should be heard en banc, by a division of the court, or without oral argument.

<u>Number responding</u>	<u>Percent</u>
Approve — 112	68.71
Disapprove — 39	23.93
No opinion — 12	7.36

Typical comments on proposals "a", "b", and "c" reflect the concern that these changes might give one justice too much power,<sup>116</sup> and also might tend to inhibit frank discussion at prehearing conferences.<sup>117</sup> The high negative response rate to these three proposals indicates that the cumulative effect of their enactment may be to

---

116. "Such a rule places too much power in a single Justice. In two of my cases the hearing justice predicted a result that I would lose when in each case I won a unanimous decision on appeal." Questionnaire no. 130 (on file at the *Minnesota Law Review*)

117. The proposal that the prehearing conference statement and conference discussion no longer be treated as confidential was heavily criticized. For example, one responding practitioner said: "Confidentiality must be preserved to foster meaningful settlement negotiations. If there is a chance that the justices who will hear the case know what went on, lawyers will not be as frank and open at the conference." Questionnaire no. 245 (on file at the *Minnesota Law Review*). Another remarked "that this rule would significantly damage the frankness of the matter discussed and the way in which they are discussed and would make the possibility of settlement lessened." Questionnaire no. 114 (on file at the *Minnesota Law Review*). Finally, one attorney contended that "on final hearing you would be arguing the views of both the trial court and the hearing justice." Questionnaire no. 135 (on file at the *Minnesota Law Review*).

undermine the legal community's favorable impression of the prehearing conference concept by removing perceived safeguards against coercion.

It is obvious that if a justice presiding at a prehearing conference may brief his fellow justices on all the discussion that took place at a conference (except for settlement discussions), and if he may also participate fully in the ultimate disposition of the case, the conference participants are unlikely to candidly discuss their case before him. Although the added leverage these proposals give presiding justices may enable them to actually force frank discussion, this new leverage is achieved at the expense of increased opportunities and incentives for coercive practices. Even if the members of the court do not regularly make use of this power to coerce, the proposals seem unjustified; the state's highest court should be a collegial decision-making body that reaches its decisions through full-fledged adversary proceedings. Procedures that allow a single justice to circumvent this process, and which assign the practical determination of an appellant's fate to an informal hearing, place the goal of judicial economy on too high a pedestal. The bar's disapproval of proposals "a", "b", and "c" is ample evidence that the changes are undesirable for reasons far more important than unclogging the court's calendar.

The favorable response of the legal community to statement "d", however, indicates that it may be a worthwhile reform. The proposal simply gives the presiding justice at a prehearing conference the power to decide whether the case should be heard en banc, by a division of the court, or without oral argument. This determination was previously made by the screening commissioner.

Although some of the comments on this proposal reflect the fear that it also might have the effect of increasing the presiding justice's coercive powers, on balance the change appears justifiable. A presiding official might attempt to use this power to force parties to settle, but regardless of what action the official takes, the parties will not be deprived of a collegial decision of the court based on fully briefed arguments. Therefore, this reform achieves the goal of increasing the presiding justice's power to encourage settlement without destroying litigants' rights to a collegial decision.

### VIII. CONCLUSION

There is no question that the Minnesota Supreme Court's prehearing conference experiment has been a success. The fact that, during the experimental year, the overall rate of settlement was 12.7% higher than during the preceding year lends some support to the hypothesis that prehearing conferences reduce appellate court workloads. It is also significant that the average time required to

process a case during the experimental year was 382 days, down substantially from the 405 days required in the previous year.

The findings of this study cast serious doubt upon the criticisms that prehearing conferences force litigants into unfavorable settlements, impose unfair expenses on certain parties, and cause a loss of respect for the appellate process. Moreover, the study has produced evidence that judicial officers are more effective than non-judicial officers in encouraging settlement. Unfortunately, this threshold finding does not resolve the more subtle issue of whether it may be counterproductive to remove a justice from the bench in order to have him perform duties that non-judicial officers perform almost as well. Finally, the study process revealed a pressing need: the court should create some monitoring system for the conferences.

The most interesting information generated by this study, however, may be the comments that practicing attorneys added to their questionnaires. These comments, as well as the questionnaire results, indicate that some of the recent changes in conference rules may be ill advised. There is little doubt that the new rules, which allow justices to participate actively in both the prehearing conference and final disposition of a case, will diminish the confidential nature of the conference. The irony of this situation is that most of the questionnaire comments revealed that confidentiality was the essential element behind the success of the conference. It is hoped that the practicing bar's reaction to these rule changes will not be so unfavorable as to undo the positive results observed in this study.

